Supreme Court, U.S.
FILED
OCT 14 1992
OFFICE OF THE CLERK

(4)

No. 92-233

In The

Supreme Court of the United States

October Term, 1992

S.M.A. HASAN,

Petitioner,

v.

LYNN MARTIN, SECRETARY OF LABOR,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONER

MICHAEL D. KOHN*
STEPHEN M. KOHN
KOHN, KOHN & COPALINTO, P.C.
517 Florida Ave., N.W.
Washington, D.C. 20001-1850
Telephone: (202) 234-4663
Attorneys for Petitioner, S.M.A. Hasan

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

CERTIORARI IS WARRANTED TO DETERMINE WHETHER PETITIONER, MR. HASAN, ENGAGED IN INTERNAL PROTECTED ACTIVITY

Respondent, asserts that certiorari should be denied because mere "disagreement with administrative fact findings" does not "warrant this Court's review." Brief for the Respondent in Opposition ("Respondent's Brief") at p. 6. In support of this assertion respondent argues that "petitioner's claim lacks merit" because there is "substantial evidence" on the record to support the conclusion that Mr. Hasan's blacklisting " 'was not based, even in part, on his safety complaints. . . . ' " *Id.*, at p. 6 (quoting to the Recommended Decision and Order ("R.D. and O.") of the Administrative Law Judge ("ALJ"), Pet. App. at p. A26).

This argument is misplaced for two reasons. First, the argument rests on a finding of the ALJ which was specifically not adopted or approved by the Secretary of Labor ("SOL"). The SOL was specific in what part of the R.D. and O. she had adopted, and specifically limited herself to the ALJ's " 'Findings of Fact, General Findings' R.D. and O. at 2-4 [Pet. App. pp. A19-A23], and his conclusion that Respondents [Texas Utilities Electric Co., and Stone & Webster Engineering Corp.] did not violate the E[nergy] R[eorganization] A[ct] in their treatment of [Mr. Hasan]." Final Decision and Order of SOL. Pet. App. at p. A13. Yet, the sole record support respondent relies upon to claim that she had properly reached the determination that Mr. Hasan had not been discriminated against is the very portion of the ALJ's R.D. and O. which was *not* adopted by the SOL. *See* Pet. App. at p. A26.

Respondent's argument must fail because under Section 210 of the ERA, *only* the SOL is permitted to make final factual (or legal) determinations. A decision of an ALJ is merely a "recomended decision" and the SOL has the sole authority to issue a "final order" based upon the record. *Procedures for the Handling of Discrimination Complaints under Federal Employee Protection Statutes,* 29 C.F.R. § 24.6(a) & (b). The SOL did not adopt the ALJ's finding of fact that TUEC's decision to recommend that its contractors not hire Mr. Hasan was not based, "in part," on Mr. Hasan's protected activity and, as such, she cannot rely on this assertion now. But, should this Court find Mr. Hasan's internal safety-related complaints protected under the law, this case should then be remanded back to the SOL so the SOL can render an independent and final decision on this critical finding of the ALJ.

Second, the SOL did not overturn the ALJ's holding that the *Brown & Root* doctrine prohibited Mr. Hasan from recovery,[1] but rather argued before the Fifth Circuit that the *Brown & Root* doctrine required the panel to affirm the decision of the SOL. Brief for the Secretary of Labor at p. 35 ("Any panel of this Court is bound by *Brown & Root,* however, so under no circumstances could Hasan prevail here based on the purely internal complaints he alleges."). The SOL further argued to the panel that "if this Court finds it necessary to decide whether Hasan

---

[1] The ALJ concluded that "since this case arises in the Fifth Circuit" Mr. Hasan's internal "comments and threats" could not be considered "protected activities" because they "*were not* communicated to the NRC." A25 (emphasis in the original).

engaged in protected activity, it should remand that question to the Secretary, for the appropriate factual determinations." *Id.*, at p. 37.

Exactly why the Fifth Circuit upheld the SOL's Order is unclear, but on the face of the Fifth Circuit's decision it appears that the Fifth Circuit relied on the *Brown & Root* doctrine and, at the urging of the SOL, dismissed Mr. Hasan's appeal based on that doctrine. Pet. App. A1-A2.

The SOL essentially duplicated the same error identified in *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984), inasmuch as the SOL *never* performed an independent analysis to determine whether Mr. Hasan's alleged personality conflict constituted sufficient justification to blacklist him from the Comanche Peak site. The issue before this Court is whether Mr. Hasan's internal activity constituted protected activity and, if so, the Secretary necessarily would be required to perform an independent analysis of the record to determine whether the blacklisting of Mr. Hasan was proper.

As the *Mackowiak* Court correctly noted:

> The Secretary's reliance on the ALJ's findings to resolve this ultimate question is flawed. The ALJ concluded that Mackowiak had not engaged in any protected conduct. He did not reach the 'dual motive' analysis required by *Mt Healthy*. Therefore, his findings do not support the Secretary's conclusion. . . . By failing to differentiate between protected and unprotected manifestations of 'bad attitude,' the Secretary rendered review impossible. We must remand for further proceedings.

Mackowiak, 735 F.2d at 1164.

The parallels between the instant case and *Mackowiak* are readily apparent. In *Mackowiak,* the legitimate reason for the termination was "attitudinal problems." *Id.,* at p. 1161. Here, the only justification for the blacklisting of Mr. Hasan is an alleged "personality conflict." Pet. App. at p. A13. Like Mr. Mackowiak, who was found to be technically competent, *id.,* Mr. Hasan likewise a competent engineer who received continuous pay increases and better than average performance reviews during his entire tenure at Comanche Peak. Respondent's Brief at p. 7; Court of Appeals Record Excerpts at R. 226; and Claimant's Trial Exhibits 8, 10, 12, and 13.

The *Mackowiak* Court correctly reasoned that it is self-evident that a whistleblower may develop personality conflicts with those who are adversely affected by his whistleblowing activity. *Mackowiak,* 735 F.2d at 1164.[2] The SOL's failure to perform an independent analysis of the record to determine whether Mr. Hasan's protected activity was the cause of the personality conflicts or whether Mr. Hasan was blacklisted in part due to his internal protected activity. This failure would constitute reversible error requiring a remand should this Court determine

---

[2] It should be noted that the Fifth Circuit has held that personality conflicts are a natural outgrowth of engaging in protected activity, and could not constitute the sole reason for terminating an employee who engaged in protected activity. *Collins v. Baptists Memorial Geriatric Center,* 937 F.2d 190, 193 n.8 (5th Cir. 1991) ("personality conflict" arising from "protected activities" would "not provide a legitimate reason" for an employee's discharge). *Accord, Kansas Gas & Elec. Co. v. Brock,* 780 F.2d 1505, 1507 (10th Cir. 1985).

that Mr. Hasan's conduct constituted internal protected activity.

Finally, the fact that the issue of the internal protected activity is being raised by the SOL in the 5th Circuit and the Third Circuit, Respondent's Brief at p. 9, constitutes compelling reason for this Court to grant certiorari and resolve this issue.

CONCLUSION

This Court should grant Mr. Hasan's petition for a writ of certiorari and determine the narrow legal question of whether purely internal safety related complaints are protected under Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851. If this Court were to reject the *Brown & Root* doctrine, then this case must be remanded to the SOL for a determination as to whether, "but for" Mr. Hasan's personality conflicts, he still would have been blacklisted from the Comanche Peak nuclear project.

Respectfully submitted,

MICHAEL D. KOHN*
STEPHEN M. KOHN
KOHN, KOHN & COLAPINTO, P.C.
517 Florida Ave., N.W.
Washington, D.C. 2001-1850
Tel. (202) 234-4663

Attorneys for Petitioner
S.M.A. Hasan

*Counsel of Record

Dated October 14, 1992